REPAIR OR REPLACE: LIFTING SEC REGULATION FROM PATCHWORK TO PERMANENCE

OHIO STATE ENTREPRENEURIAL BUSINESS LAW JOURNAL 2012 SYMPOSIUM

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On April 13th, 2012, the Ohio State Entrepreneurial Business Law Journal held a symposium on the pressures of the digital age on federal securities regulation. The formal title was "Repair or Replace: Lifting SEC Regulation from Patchwork to Permanence." The focus of the symposium was on the regulation of the securities offering process. A variety of questions were addressed. Is the public/private distinction still useful? Should the regulation of private offerings permit widespread use of the Internet? Should the regulation of public offerings include Internet solicitations?

The week before the symposium, Congress surprised many by reaching into its basket of pending bills on securities offering procedures, pulling out one bill, and passing it—the Jumpstart Our Business Startups Act[1] (JOBS Act). The JOBS Act is controversial, affecting both public and private offerings. It attracted most of the comments from panelists and audience members during the symposium. Discussion was lively and, well, fun.

The opening panel on private offerings consisted of Professors Robert Brown, Jr., Rutheford B Campbell and Eric Alden. Professor Campbell discussed exempt offerings under Regulation A and Regulation D. Regulation A was rarely used before the JOBS Act, and Professor Campbell remains skeptical of the Act's effect on the use of Regulation A. His very thorough paper on the subject follows. Professor Campbell previously wrote a remarkable piece on Regulation D that carefully examined the future of what was intended to be the most-used registration exception to public offerings. The picture he painted was not pretty. Like Regulation A,

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[1] Jumpstart Our Business Startups Act, Pub. L. No. 112-106, 126 Stat. 306 (2012) (to be codified in scattered sections of 15 U.S.C.).

Regulation D appears not to have been affected by the JOBS Act. His previously published article has been reprinted in this edition to provide context to his most recent research. Professors Brown and Alden also discussed private offerings and, among many other topics, the limits on general advertising. Congress relaxed some of these limits in the JOBS Act, but the impact has yet to be seen. Professor Brown was very leery of the reduced investor protections in the JOBS Act for private offerings.

Our second panel included Professor Joan Heminway, Professor Andrew Schwartz and practicing attorney Jeremiah Thomas. Their panel topic was the "crowdfunding" phenomena: the use of public offerings through the Internet. The crowdfunding provisions of the JOBS Act were an immediate public sensation. Do they incentivize new forms of investor fraud or are they a belated recognition of a changing information industry? The debate was lively and mufti-faceted. Professor Heminway's essay considers the definition of a security in light of the rush to engage in crowdfunding. Her conclusion, that we need to simplify our definitions, rings true. Mr. Thomas emphasized the value in the new crowdfunding procedure, describing a lawyer's attitude to the new rules: "We will find a way to use them."

Our third panel discussion focused on public offerings under the JOBS Act. Panelists included myself, Professor Alan Palmiter and Professor William Sjostrom. Professor Palmiter's fine piece on the lack of adequate disclosure of issuers' methods of pricing offerings, a critical and yet overlooked subject, follows. Professor Sjostrom centered his presentation on the new liability provisions for crowdfunding, arguing that they may kill the public offering procedure. I focused on the new disclosure rules that are graded by issuer size. Will the new reduced disclosure rules for "emerging" companies lead to more initial public offerings? Both my and Professor Sjostrom's articles on these topics will be included in our next edition.

Professor James Park delivered the symposium's keynote address, which was a thoughtful analysis of the relationship between tighter federal rules on corporate governance and more lenient rules on corporate public offerings. In this edition, he evaluates whether the interrelated trends will lead, in the end, to suboptimal investor protections.

Our symposium was one of the first on the JOBS Act, an astonishing piece of legislation, both for what it included and for what it did not include. The participants seemed to enjoy the novelty of the new rules, and brought an array of viewpoints on their possible effects. The JOBS Act was Congress's statement that existing rules on private and public offerings are unsatisfactory in light of digital-age developments. However, Congress's response was both a bit crude and a bit messy, leaving the SEC to reconcile the various requirements. The prospect of significant changes in the private

and public offering rules promises stimulating discussion for the near future. I suspect, however, that Congress and the SEC will revise this entire area shortly when there is more information available on the JOBS Act's success at effecting reform of the current public offering regime.